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In the Supreme Court of the United States

OCTOBER TERM, 1984

ROOSEVELT THEODORE BECTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that an indictment under the continuing criminal enterprise (CCE) statute must enumerate the specific offenses constituting the continuing series of drug violations.

1. Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; two counts of interstate travel in aid of racketeering enterprises, in violation of 18 U.S.C. 1952; and one count of possessing cocaine, in violation of 21 U.S.C. 844. He was sentenced to 25 years' imprisonment and fined $25,000 on the CCE count. On the remaining counts, he received lesser concurrent prison terms and fines totaling an additional $25,000. The court of appeals reversed on one of the interstate travel counts and affirmed in all other respects (Pet. App. A1-A13; 751 F.2d 250).

The evidence at trial, which petitioner does not challenge, is outlined in the opinion of the court of appeals (Pet. App. A3-A4). In brief, it showed that between 1976 and 1980 petitioner purchased $3-$4.5 million worth of marijuana from an organization headed by Edward Hindelang. On one occasion during that period, Steven Helmich delivered a truckload of marijuana to three locations in St. Louis at petitioner's direction. In addition, between 1977 and 1979 petitioner sold $1 million worth of marijuana to Tony Olivastro. Petitioner also sold large quantities of marijuana, including one sale of 2,000 pounds, to Nathaniel Yancy; moreover, on one occasion Yancy delivered 4,000 pounds of marijuana to a buyer at petitioner's direction. Finally, petitioner owned one-third of an 18,000 pound shipment of marijuana that was seized in St. Louis County, Missouri, in February 1980.

In addition to possessing and selling marijuana, petitioner participated in marijuana smuggling activities. In August or September 1979, the Hindelang organization smuggled 228,000 pounds of marijuana into Pascagoula, Mississippi, by ship. Two of petitioner's relatives helped to unload the vessel, and petitioner received $80,000 for their services. In December 1979, Hindelang attempted to smuggle another shipload of marijuana into Galveston-Houston, Texas. Petitioner arranged to have four of his relatives assist in unloading the ship, for which he was supposed to receive a daily fee of $20,000 for each person. However, state and federal agents uncovered the operation and arrested the participants. Petitioner then arranged for Hindelang to provide his relatives with money for bail and attorney's fees.

In January 1980, petitioner secured the use of a house in Fort Lauderdale, Florida. Accompanied by Yancy, he traveled from Missouri to Florida twice that month for the purpose of obtaining marijuana. During the first trip,

Yancy and others distributed 7,000 pounds of marijuana from the Fort Lauderdale house to a number of buyers; petitioner and Yancy then returned to St. Louis. Petitioner did not manage to acquire any marijuana during the second trip, but he informed Yancy that marijuana would be delivered to St. Louis by a supplier.

2. Petitioner contends that the CCE count in the indictment was defective because it simply tracked the language of the statute and did not set out the specific offenses constituting the continuing series of drug violations. However, while petitioner did move to dismiss the indictment on the general ground that it was vague and indefinite and did not adequately inform him of the charges, he did not specifically object to the failure of the CCE count to enumerate the predicate drug offenses. Accordingly, as the court of appeals held (Pet. App. A10), petitioner's challenge to the indictment was waived. See Fed. R. Crim. P. 12(b)(2) and (f).[1]

In any event, this issue does not warrant further review. Petitioner has cited no case that has adopted his argument, and the Court recently declined to review the identical question in *Sterling* v. *United States,* cert. denied, No. 84-1177 (May 13, 1985). For the reasons stated in our brief in opposition in *Sterling* (a copy of which is being sent to counsel for petitioner), the instant petition should likewise be denied. We add the following to our submission in *Sterling*.

First, because a CCE indictment need not set out the specific predicate offenses, this case involves no issue of an amendment to the indictment or a conviction on an offense that the grand jury did not charge. For this reason, the cases

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[1]Indeed, petitioner did not even raise this contention until his reply brief in the court of appeals.

cited by petitioner (Pet. 5, 6-8) are inapposite.[2] Nor does it involve an indictment that is legally insufficient on its face because of the failure to allege a necessary element of the charged offense.[3] Finally, the court of appeals' decision in *United States* v. *Miller*, 715 F.2d 1360 (9th Cir. 1983), modified, 728 F.2d 1269 (9th Cir. 1984), upon which petitioner relies (Pet. 4, 8-9), has now been reversed by this Court (No. 83-1750 (Apr. 1, 1985)), and the Court's ruling provides no support for the argument that petitioner advances.

Petitioner also argues (Pet. 9) that "[u]nless the three predicate felonies underlying an enterprise charge are set forth with particularity, a defendant loses the protection afforded him by the double jeopardy clause" because a "judgment in the first trial would not prevent a new indictment and trial on charges that might have been relied upon as predicate felonies by a jury." However, petitioner has not been subject to successive prosecutions for CCE and substantive predicate offenses, and therefore his concern is, at best, premature.[4] More importantly, in assessing a claim under the Double Jeopardy Clause that a defendant has been prosecuted twice for the "same offense," courts are not

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[2]See *Russell* v. *United States*, 369 U.S. 749 (1962); *Stirone* v. *United States*, 361 U.S. 212 (1960); *Ex parte Bain*, 121 U.S. 1 (1887); *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981); *United States* v. *Stewart Clinical Laboratory, Inc.*, 652 F.2d 804 (9th Cir. 1981); *United States* v. *Crocker*, 568 F.2d 1049 (3d Cir. 1977).

[3]See *United States* v. *Winter*, 663 F.2d 1120, 1138 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

[4]Moreover, for the reasons stated in our brief in *Garrett* v. *United States*, No. 83-1842 (argued Jan. 16, 1985), we do not believe that the Double Jeopardy Clause bars successive prosecutions on CCE and substantive predicate charges. (A copy of our brief in *Garrett* is being sent to counsel for petitioner.) Because successive prosecutions have not been brought against petitioner, there is no need to hold this petition pending decision in *Garrett*.

limited to considering the face of the first indictment but instead review the entire record. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 764 (1962); *United States* v. *Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972) ("The sufficiency of an indictment is not determined by whether it alone will protect the accused against double jeopardy. The entire record of the proceedings may be referred to in the event of a subsequent similar prosecution.").

Finally, petitioner asserts (Pet. 10-11) that the failure of the CCE count to enumerate the predicate offenses denied him fair notice of the charges against him. While, as the court of appeals noted (Pet. App. A11), it might be desirable for indictments to be drafted with greater particularity, the CCE count in this case — which tracked the language of the statute and specified the time period during which the offense was alleged to have been committed — was adequate. Furthermore, the court of appeals correctly concluded (Pet. App. A10) that the other counts in the indictment, although not specifically incorporated in the CCE count, apprised petitioner of the drug activities underlying the CCE charge. Cf. *Dunbar* v. *United States*, 156 U.S. 185, 190 (1895); *United States* v. *Chilcote*, 724 F.2d 1498, 1504-1505 (11th Cir. 1984), cert. denied, No. 83-6624 (May 29, 1984).[5] Such actual notice sufficed to sustain the charges against petitioner (see *Goodloe* v. *Parratt*, 605 F.2d 1041, 1045-1046 (8th Cir. 1979)), and there is no occasion for further review of this fact-bound issue.[6]

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[5]Petitioner's reliance (Pet. 5, 11) on *Dunn* v. *United States*, 284 U.S. 390 (1932), is entirely misplaced. The issue in *Dunn* was the permissibility of inconsistent jury verdicts on separate counts, not the sufficiency of the indictment.

[6]To the extent that the jury was allowed (quite properly, in our view) to rely on evidence of drug violations that were not identified in the indictment (see Pet. 8), petitioner failed to preserve an objection to those instructions at trial (see Pet. App. A11).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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